REMARKS/ARGUMENTS

The election/restriction requirement dated November 14, 2006 has been considered. The Applicant provisionally elects claims 1-4, 21-43, 45, 53-58, 66-72, and 81-102 which includes claims 4, 45, and 72 of Species I directed to predicting disordered breathing by monitoring a physiological condition. The Applicant traverses the species election requirement of the identified 17 species. The Office Action identifies claims 1-3, 21-43, 53-58, 66-71, and 81-102 as generic. Applicant respectfully asserts that claims 1-3, 20-44, 50, 53-59, 65-71, 81-102 are generic and are not drawn to any particular species, and should be examined accordingly.

Having complied with 35 U.S.C. § 121, the Applicant respectfully assert that species election requirement is in error because: 1) embodiments restricted to different species are not mutually exclusive (See, MPEP § 806.04(f)); 2) embodiments restricted to different species overlap in scope (See, MPEP § 806.04(f)); 3) the Examiner has not met the burden required by the MPEP to establish that the inventions are independent or distinct (See, MPEP § 808.01(a)); and 4) the Examiner has not explained why there would a serious burden on the Examiner if restriction is not required. (See, MPEP § 808.01 (a) and § 808.02).

Restriction between species is proper if the species are mutually exclusive. MPEP § 806.04(f). The Examiner fails to explain why any of the identified 17 species would be mutually exclusive with respect to one another. The Applicant respectfully submits that all of the identified 17 species could be incorporated into a single embodiment and practiced simultaneously to predict disordered breathing. Accordingly, the 17 species are not mutually exclusive and the species restriction amongst them is improper.

The species election requirement is erroneous because the claims directed to some species identified by the Examiner overlap in scope. MPEP 806.04(f) states "to require restriction between claims limited to species, the claims must not overlap in scope." (emphasis added). The Examiner fails to explain why any of the identified 17 species, as claimed, would not overlap in scope. The Applicant respectfully submits that many of the identified species do overlap in scope. For example, Species I includes monitoring a physiological condition, while Species II-VII, and XVI include monitoring the following physiological conditions: sleep condition, respiratory condition, cardiovascular system

condition, nervous system condition, blood chemistry condition, muscle system condition, and patient posture, respectively. Moreover, Species VIII includes monitoring a non-physiological condition, while Species IX and XV include monitoring the non-physiological conditions of the environment and air pollution, respectively. Accordingly, many of the 17 species do indeed overlap in scope and the species restriction amongst them is improper.

"A requirement for restriction is permissible if there is a patentable difference between species as claimed." See MPEP § 803 and § 808.02." (MPEP § 808.01(a)). "Examiners must provide reasons and/or examples to support conclusions." (MPEP §803).

In support of the restriction requirement, the Examiner states that "[t]he species are independent or distinct because each monitors a different patient parameter and requires different equipment." (Office Action, Page 3). The Applicant respectfully disagrees with a great breadth of the Examiner's assertion. For example, Species I, which monitors a physiological condition, could monitor the same patient parameter, and require the same equipment, as Species II (sleep condition), Species III (respiratory condition), Species IV (cardiovascular system condition), Species V (nervous system condition), Species VI (blood chemistry condition), Species VII (muscle system condition), and Species XVI (patient posture). Moreover, Species VIII, which monitors a non-physiological condition, might monitor the same parameter and require the same equipment as Species XV (which monitors air pollution) or Species IX (which monitors an environmental condition). Accordingly, many of the Species identified by the Examiner are not independent or distinct for the reason cited by the Examiner, and restriction on that basis is therefore improper.

The Applicant is directing arguments to the limited issue of the lack of proper grounds supporting the restriction of the Applicant's claims for examination purposes. As such, the Applicant's characterization of the claimed subject matter as it may pertain to the issue of distinctiveness within the context of restriction practice is not to be construed as an admission that the claimed inventions are obvious over each other within the meaning of 35 U.S.C. § 103.

In order to establish reasons for insisting upon restriction, the Examiner must explain why there would be a serious burden on the Examiner if restriction is not required. (See, MPEP § 808.01(a) which references MPEP § 808.02). To comply with this requirement, the

Examiner must show by appropriate explanation one of the following (A) separate classification; (B) separate status in the art when they are classifiable together, or (C) a different field of search. (MPEP § 808.02).

The Examiner has not provided any explanation as to why there would be a serious burden if restriction was not required with regard to the 17 species identified in the Office Action as required by MPEP § 808.01(a) and § 808.02.

For at least these reasons, the election of species requirement is in error and must be withdrawn. In view of the above, the Applicant respectfully requests reconsideration and withdrawal of the requirement for restriction.

Authorization is given to charge Deposit Account No. 50-3581 (GUID.133PA) any necessary fees for this filing. If the Examiner would find it helpful to discuss this issue by telephone, the undersigned attorney of record invites the Examiner to contact the attorney of record.

Respectfully submitted,

HOLLINGSWORTH & FUNK, LLC
8009 34th Avenue South, Suite 125
Minneapolis, MN 55425
952.854.2700

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By: _____
Clara Davis
Reg. No. 50,495